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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 631

BILL CORBETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 29-35) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1956. The petition for a writ of certiorari was filed on December 14, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support the verdict.

2. Whether the trial court committed reversible error in admitting into evidence in a criminal prosecution for income tax evasion (1) the Government's summaries of petitioner's unreported income and (2) financial statements submitted by petitioner to the Government and to various banks.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

STATEMENT

On August 1, 1952, petitioner was indicted in the United States District Court for the Western District of Washington on four counts of wilful attempted evasion of his individual income taxes for the years 1945

through 1948, in violation of Section 145(b) of the Internal Revenue Code of 1939. (R. 3-6.) After a jury trial petitioner was found guilty on Counts 1 and 2, relating to 1945 and 1946, and not guilty on Count 3 relating to 1947. (R. 1135.) Count 4 was dismissed at the close of the Government's case. (R. 826-827.) On December 28, 1954, he was sentenced to consecutive prison terms of two and one-half years on each of the two counts and fined $5,000 on each count. (R. 17-18, 1154.) The Court of Appeals affirmed. (Pet. 29-35.)

The evidence to support the verdict may be summarized briefly as follows:

In 1944 petitioner acquired the stock of the Claremont Hotel in Seattle, Washington, a 150-unit building. He operated the hotel as a corporation until July 1, 1945, and thereafter continued its operation as a sole proprietorship. (R. 863, Govt. Exs. 1 and 3.) This venture was the principal source of the income reported on petitioner's tax returns.[1] He produced for the Treasury agents' examination a set of books which were in agreement with the returns (R. 761) except that the returns included income unrecorded on the books in the amount of $1,400 in 1945 and $2,000 in 1946. These sums were reported on the returns (Govt. Exs. 1 and 3) as income from "Other sources—Sundries, wagering, etc."

On petitioner's books credits to income were posted in an earnings journal from a "daily transcript" which,

[1] Petitioner and his wife filed separate returns on the community property basis. Petitioner's share of 1945 reported joint income was $10,021.48, of which $6,777.86 was reported as coming from the hotel. His share of 1946 reported income was $8,274.44 of which $6,179.50 was attributed to the hotel. (Govt. Exs. 1, 3, 74.)

in turn, was compiled from guest ledger sheets, which were simply carbon copies of invoices rendered to persons staying at the hotel. (R. 309, 313.) When a guest paid his bill the receipt of the money was usually entered in the appropriate column of the guest ledger sheet and on a daily cash sheet. (R. 265, 342, 344.) The daily cash sheet was checked against the cash receipts, which were deposited into the bank account. (R. 268-269.) Since petitioner reported income on the accrual method the guest ledger sheets constituted the basic accounting record. (R. 309, 313.)

Vowles, petitioner's night clerk during the years in question, testified that on petitioner's instructions he had followed the consistent practice of renting rooms for one night to transients without entering the receipt of the money on the daily cash sheets and without preparing a guest ledger sheet; that he would put the cash in a special envelope which petitioner would pick up each morning; and that it averaged between $20 and $30 every night except for a period in the fall of each year when petitioner was on vacation. (R. 595-596, 605-611.) Two other former employees of petitioner corroborated Vowles' testimony generally and stated that no record of any kind was made of such rentals except on the registration cards, which were burned periodically. R. 394-396, 580-583.) A business acquaintance of petitioner testified (R. 638, 641-642) that one night in 1946 when he was at the hotel petitioner showed him 10 or 15 registration cards just after the desk clerk had gone off duty and stated (R. 642):

> I never let the clerk rent these rooms. I always hold them out. Then after he goes off duty I rent the rooms or my boy rents the rooms and we never

make any accounting for tax purposes * * * it does amount to considerable.

The bulk of the unreported income proved at the trial, however, resulted from petitioner's extensive use of a device known as "allowances". He maintained an allowance journal, the totals of which were offset against income, thus reducing net income recorded and reported. (R. 284, 288-290, 300, 605, 709-711, 762.) On some occasions the receipt of cash from a guest would be entered directly in the allowance column on the guest ledger sheet, on petitioner's instructions, with no entry to record the receipt of the money. (R. 364-365.) The total reduction thus effected was $22,579.41 in 1945 and $29,784.70 in 1946. (R. 783.) More often, however, there would be prepared an allowance slip which would be entered in the allowance journal. All allowance slips had to be authorized and approved by petitioner, who would initial them and mark them either "Cash shortage" or "Tran. rent", meaning transient rent. (R. 264, 304, 1031; Govt. Exs. 9, 13-17, 72-73.)[2] Examination of the guest ledger sheets, which the Treasury agents associated with corresponding allowance slips, disclosed a large number of alterations. (Govt. Exs. 13-17, 72-73.) Often, after a bill had been paid by the guest and the amount had been entered in the cash column of the guest ledger sheet, that entry would be erased and placed in the allowance column (R. 152-166, 171, 356-

[2] It was shown that petitioner and members of his family had access to the cash drawer, withdrawing money at will and substituting a voucher slip marked, e.g., "Groceries", "Advertising", or "Painting." (R. 379-380.) It was also shown that, although postage stamps purchased by the hotel for sale to guests were charged to expense, petitioner and his family took cash from the drawer in which stamp money was kept without leaving any voucher at all. No record was made of such withdrawals. (R. 381.)

364), with the result that the net income recorded and reported was improperly reduced. Two of petitioner's former employees testified as to a number of items involving such crude erasures on the guest ledger sheet that they could still recognize their own handwriting in the cash column, showing that such guests had paid their bills in full. (R. 152-166, 171, 356-364.) There were many other instances in which petitioner had not even bothered to erase the entry on the guest ledger sheet showing receipt of the money. (R. 772; Govt. Exs. 72A, 72B.) [3]

The falsity of some of the other allowance entries was shown by the testimony of twenty-one guests, who testified that they had not received allowances, as indicated by petitioner's guest ledger sheets, but had paid their bills in full. (R. 485-540.) A desk clerk who worked for petitioner from 1945 to 1948 testified that she knew of only one or two guests who were staying at the hotel who were not charged, but in those cases the guest ledger sheet was marked "Complimentary". (R. 339-340, 355.) Even these guests had to pay for such items as telephone and garage expense. (R. 356.) Still other alleged allowances were disproved by the testimony of this witness based on a personal record she had maintained (Govt. Ex. 45) of certain amounts received by the hotel from guests and falsely recorded as allowances (R. 368-374).

The falsity of additional items was proven by reference to petitioner's daily cash sheets. It was shown that he systematically altered these records by eradicat-

[3] There was testimony by a former employee that on one occasion petitioner "made a statement referring to the allowances" and then advised her that she "was in this just as deep as he was and that [she] was just as guilty." (R. 395.)

ing entries or by instructing his employees to do so. Petitioner would place check marks beside some of the larger items and have them removed by ink eradicator (or sometimes by rewriting the entire sheets, omitting the checked entries) after which the blank spaces would be filled in by entries for very small amounts, such as telephone charges. The amount of cash so removed from the cash sheets would then be extracted from the cash drawer, sealed in an envelope marked with petitioner's name or initials, and placed in the hotel safe. The only remaining record of the transaction would then consist of the allowance slip and the false entry in the allowance column of the guest ledger sheet.[4] (R. 348-355.) The Government produced an expert who had restored by a chemical fuming process some of the entries on the cash sheets that had been obliterated by ink eradicator. These restored entries showed, as petitioner's employees had testified, that substantial cash receipts had been entered on the cash sheets and then removed by eradication. There were allowance slips approved by petitioner which corresponded with the deleted cash entries. (R. 541-572, Govt. Exs. 52-62.) It was petitioner's practice, when falsifying the cash sheets, to remove a corresponding amount of cash from the money drawer so that the books would remain in balance. (R. 149-150.)

The agents compared petitioner's bank deposit slips with the guest ledger sheets and discovered that on 47 occasions during 1945 petitioner deposited checks (to-

[4] Petitioner instructed an employee that when he (petitioner) was out of town she was not to record large receipts, i.e., $50 or $60, on the cash sheet, but was to enter such receipts as allowances putting the money in an envelope and placing it in the safe for petitioner. (R. 366-367.)

taling $1,989.88) on the day following the entry of an allowance in the exact amount of the allowance. (R. 766-770.) The Government introduced into evidence, without objection (R. 824-825), a computation which summarized petitioner's unreported income as follows (Govt. Ex. 74):

	1945		1946	
Net income reported (petitioner's community share)		$10,021.48		$ 8,274.44
Add: Unreported room rental income at $20 per day [5]	$ 3,680.00		$ 7,300.00	
Salary from corporation to Loretta Newton to Bill Corbett [6]	295.04			
Allowances restored to rental income	14,959.84		17,542.83	
Total additions to income	$18,934.88		$24,842.83	
Less: Unidentified cash overages and transient room rentals restored to income on the books [7]	1,465.73		5,106.25	
Total additional net income	$17,469.15		$19,736.58	
Less: one-half community income to wife	8,734.57		9,868.29	
Petitioner's share of additional net income		8,734.58		9,868.29
Corrected net income		$18,756.06		$18,142.73
Tax		$ 6,883.39		$ 5,720.30
Tax per return		2,762.94		1,797.71
Tax deficiency		$ 4,120.45		$ 3,922.59

[5] This item is based on the testimony of Vowles (*supra*, p. 4). Since petitioner operated the hotel as a corporation until July 1, 1945, the income received during the first half of that year would constitute income to the corporation.

[6] Loretta Newton testified that in 1945 she received salary checks for her services as vice-president of the corporation but was always required to endorse them to petitioner and never kept any of the money. (R. 382-384.) This figure represents the total, net of income taxes withheld. (R. 775-776.)

[7] These amounts represent transient rentals and unidentified cash receipts recorded as income on the books. Their deletion from reconstructed net income was necessary because it was possible that some of the items involved had been treated as unreported income by the Government. (R. 762-763, 800-802; Govt. Exs. 10, 11, 11A, 12.)

There was testimony that on two occasions in the fall of 1946 petitioner told a prospective purchaser of the hotel that its average earnings were $86,000 per year. (R. 654-655.)

Petitioner testified in his own behalf at the trial. He contended that the alterations in his records were made not to evade taxes but to give an appearance of compliance with O.P.A. regulations then in force, and that several of the Government's important witnesses had testified falsely because of grievances they had against him. (R. 1002-1007, 1009-1017.)

ARGUMENT

1. Petitioner's contention (Pet. 8-10, 18-19) that the evidence is insufficient to support the verdict is plainly without merit. We submit that the evidence of wilful and substantial evasion *(supra)* is overwhelming. Petitioner's argument is that the Government's case is based on two "assumptions" made by the Treasury agents. He contends (Pet. 19) that his conviction can be sustained only on (a) "Holtberg's assumption that all allowance entries represented unreported income" or (b) "alternatively, on Marx's assumption that unrecorded night rentals averaged $20 per night."

(a) Agent Holtberg did not assume that all allowance entries represented unreported income. The total allowances deleted from income on petitioner's books was $22,579.41 in 1945 and $29,784.70 in 1946. (R. 783, *supra*, p. 5.) The unreported income claimed by the Government to be attributable to items disguised as allowances was only $14,959.84 in 1945 and $17,542.83 in 1946. (Govt. Ex. 74, *supra*, p. 8.)[8] The latter

[8] Since petitioner and his wife reported income on the community property basis, his share of the amounts under discussion is only 50%.

amounts were accumulated from the detail shown in Government Exhibits 13 to 17, inclusive, 46, 49, 51, 55, 60, 72 and 73 (R. 797), which consist mainly of hundreds of guest ledger sheets together with matching allowance slips. If the inclusion of any of these items in unreported income was improper the defense had every opportunity at the trial to demonstrate this. All of the pertinent records were in evidence (with the exception of some of the bank deposit slips—*infra*, p. 13, fn. 10) and all of petitioner's records that had not been introduced in evidence were in the courtroom. (R. 754, 757, 797.) But the record shows that there was no attempt to challenge the propriety of the agents' treatment of any of these items. The only attack made on the allowance figures at the trial was the suggestion that the Government might have charged petitioner with income in amounts representing allowances to employees which were actually made. (R. 787-788, 809.) The evidence showed clearly that this was not the case. The agents found only two instances in which a guest ledger sheet was prepared for an employee, and they assumed that in those cases the allowances were actually made, i.e., that petitioner was not paid. (R. 787-788.) None of the allowances treated as unreported income related to employees. (R. 822-823.) In fact, it was customary not to set up any charge on the books, nor to prepare a guest ledger sheet, for an employee living at the hotel. (R. 634.)

Petitioner would confine the restorations to income (Pet. 5-10) to those items where the guest was actually called as a witness, or where the erasures in the cash column of the guest ledger sheets were so crude that the employee could still identify the erased entry as her

own, or where an eradicated cash entry was restored by the chemical fuming process. (*Supra*, pp. 6-7.) This ignores the great body of other proof tending to show that the allowances were nothing more than a tax evasion device and that seldom, if ever, did they represent a bona fide forgiveness of a guest's debt. (*Supra*, pp. 5-7.) Nevertheless, the Treasury agents segregated with great care the items claimed to have been proved false (e.g., R. 747-757) and defense counsel elected to challenge none of them (e.g., R. 757-759).[9]

(b) Petitioner's argument on the unreported night transient rentals (*supra*, p. 4) is that there was a conflict in the testimony of Vowles, the night clerk, which vitiates the Government's computation. (Pet. 8-10, 20-21.) Vowles testified as to the suppression of such rentals from the records and explained how he put the cash in a special envelope which petitioner would pick up each morning. He estimated that these amounts averaged between $20 and $30 every night except for a period in the fall of each year when petitioner was on vacation. (R. 595-596, 605-611, *supra*, p. 4.) Vowles also testified that he had kept a personal record of these sums at home and that it totalled "over $7,200". (R. 611-612.) On cross-examination it was brought out that this figure represented the suppressed transient rentals for a period of almost two and a half years. (R. 633.) Although this testimony

[9] There is no merit to the contention (Pet. 14) that the Government's computations should have credited petitioner with the amounts of income from "Other Sources" reported on his returns but not reflected on the books of the hotel. See p. 3 *supra*. Petitioner's own description and treatment of these items on his returns support the conclusion that such income was entirely unrelated to that of the hotel.

conflicted with his estimate of $20 to $30 per night, neither the defense nor the prosecution attempted to have Vowles resolve the conflict or state which figure was correct. (R. 634-636.) Defense counsel did, however, argue in his summation to the jury that the Government had overstated this item, pointing to the conflict in Vowles' testimony. (R. 1080-1081.) The Government used the $20 per night figure in its computation of income (*supra*, p. 8). But, as the judge emphasized in his charge (R. 1124-1125, Pet. 32), the jury was not bound by the Government's summary (Govt. Ex. 74). In any event, the important issue was not the precise amount of tax evaded (*United States* v. *Johnson*, 319 U.S. 503, 518) but whether the evasion was wilful and substantial. The record is clear that, whichever portion of Vowles' testimony the jury accepted, the unreported income from this source, in petitioner's own words, "does amount to considerable". (*Supra*, p. 5.)

We submit that the jury's verdict is amply supported by either the evidence of the fictitious allowances or the evidence of the unrecorded night rentals.

2. Petitioner contends (Pet. 18-28) that the trial court erred in admitting into evidence (a) the Government's summary of unreported income and (b) certain financial statements submitted by petitioner to the Treasury agents and to various banks. The argument has no merit.

(a) The Government's summary of unreported income (Govt. Ex. 74, *supra*, p. 8) went into evidence without objection, defense counsel indicating that it might be admissible "as descriptive of the witness' testimony" (R. 824-825). In these circumstances peti-

tioner cannot complain at this stage of the case. *Johnson* v. *United States*, 318 U.S. 189, 200-201. Moreover, the record shows that the amounts claimed as unreported income in the summary were derived directly from Government Exhibits 13 to 17, inclusive, 46, 49, 51, 55, 60, 72 and 73, which consist mainly of many hundreds of guest ledger sheets together with the matching allowance slips. (R. 797.) These exhibits, in turn, were admitted into evidence either without objection (R. 371, 453, 464, 547, 756, 757) or over objections not relevant here (R. 104-116). It is well settled that summaries of the kind in question are admissible when based upon testimony and documents in evidence. *United States* v. *Kelley*, 105 F. 2d 912, 918 (C.A. 2d); *Graves* v. *United States*, 191 F. 2d 579, 584 (C.A. 10th); *Bell* v. *United States*, 185 F. 2d 302 (C.A. 4th), certiorari denied, 340 U.S. 930; *Hanson* v. *United States*, 186 F. 2d 61, 67 (C.A. 8th); *Gendelman* v. *United States*, 191 F. 2d 993, 996-997 (C.A. 9th), certiorari denied, 342 U.S. 909; Cf. *United States* v. *Johnson*, 319 U.S. 503, 519 (relating to a Treasury agent's oral testimony as to such computations). The trial judge carefully instructed the jury (R. 1124-1125, Pet. 32) that the Government's summary was not, strictly speaking, evidence, but was admitted to assist them in considering "the books, records and documents which are the evidence * * *". See *Holland* v. *United States*, 348 U.S. 121, 127-128.[10]

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[10] The contention (Pet. 22) that the summary was not "confined to the evidence in the record" is without substance. It refers to an agent's testimony regarding certain bank deposit slips (*supra*, pp. 7-8), which had been destroyed between the time of investigation and the time of trial. (R. 132.) No objection was made to the use of secondary evidence, i.e., the agent's testimony as to these items based on his transcripts. (R. 766-771.) Petitioner's argument that the summary was inaccurate (Pet. 19-24) has been answered in our discussion of the sufficiency of the evidence (*supra*, pp. 9-12).

(b) Equally without substance is the contention (Pet. 24-28) that the trial court erred in admitting in evidence certain financial statements of the petitioner. During the investigation petitioner submitted to the agents signed statements (Govt. Ex. 71) in which he estimated his 1938 net worth at $110,950 and his net worth at the end of 1948 at $28,021.56 (R. 740-746). It was shown that during 1946, 1947 and 1948 petitioner had submitted to various banks financial statements claiming a net worth ranging as high as $2,474,926.94. (R. 746-747, Govt. Exs. 27, 31, 38.) All of these documents went into evidence over objections not relevant here.[11] (R. 740-741.) Moreover, it is clear that the petitioner is incorrect in his contention (Pet. 18) that the statements were used "as a means of persuading the jury that defendant's tax returns are false". The court instructed the jury (R. 1123-1124) that these documents could only be considered on the issue of petitioner's intent, knowledge and credibility, and that (R. 1124),

> * * * these financial statements standing alone are not proof of any unreported income of the defendant in any of the years '45, '46 and '47. They should not be considered in your deliberations as purporting in and of themselves to show that any unreported income was received by the defendant in any year in question.

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[11] Petitioner's "basic objection" (R. 740) was that statements of a defendant are not admissible until the *corpus delicti* has been established (see, e.g., R. 100, 114). The other objection (R. 740, 741) was that the petitioner could not be prosecuted for income tax evasion because the Commissioner of Internal Revenue had not made any formal determination of his income tax deficiency for civil purposes. (See R. 77-80.) Neither of these arguments has merit or is raised in the petition.

We submit that the Government's summary of unreported income and the financial statements signed by petitioner were properly received in evidence for the limited purposes explained to the jury by the trial judge; that the objections to their use made in the petition were not made in the trial court; and that, in any event, the objections are without merit.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY, 1957.

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